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Montana Senate
Fish and Game Committee

Re: Opposition to S.B. 78

Dear Committee Members:

I provide the following to supplement my intended verbal testimony opposing SB 78, which would transform county bridges into fishing access and boat launch sites. I am testifying in opposition to this bill as a private citizen, not as another party's legal representative.

The proposed bill has a little something for everyone to hate. It severely restricts if not eliminates local government control of local infrastructure and anoints a state agency that is singularly ill equipped to design, build and maintain public highways as the state's "county bridge czar." It invites the public to misuse and abuse roads and bridges for purposes they were not designed, built or maintained, exposing local government to risk of lawsuits, legal liability and money damages. To the extent local government seeks to avoid those consequences of SB 78 by mitigating these circumstances in these unimproved right of ways, the bill contains an unfunded mandate forcing local taxpayers to bear the cost of such access.

The proposed bill also encourages public trespass onto private property by failing to require government to clearly delineate the right of way boundaries and by failing to provide funding for additional law enforcement needed to enforce these limitations. At the same time, the bill attempts to legally bind and gag the victims of such trespass by restricting citizen's access to and right of redress in our courts. This is particularly offensive as the rights involved are among our most cherished fundamental rights – our right to own and defend private property free of government confiscation without due process and payment of just compensation.

The accompanying photographs depict the manner in which the public intends to utilize county bridges, if this bill passes. As you can see, the photographs depict "sportsmen" parking vehicles on a county road bridge and its approach, blocking and interfering with on-coming traffic and trespassing on private property. SB 78 purports to "legalize" such conduct, which is patently in conflict with many other existing statutes.

Do you see any public safety or legal liability issues presented by the conduct depicted in the photographs? Regardless of *your* answer, a trial lawyer will. Set forth below is a brief outline of civil legal liability to be borne by local government and adjacent landowners if SB 78 becomes law.

A. Legal Duty: A question of law.

A county is liable for its acts or omissions like an ordinary private party. Mont. Const. art II, § 18; § 2-9-101, MCA, § 2-9-102, MCA. All property owners, including counties, owe to third parties who foreseeably may enter, cross, use or occupy their property a legal duty to exercise ordinary care in keeping their property in reasonably safe condition. § 27-1-701, MCA; § 28-1-201, MCA; *Kaiser v. Town of Whitehall,* 221 Mont. 322, 718 P.2d 1341 (1986); *Dobrocke v. City of Columbia Falls,* 2000 MT 179, 300 Mont. 348, 8 P.3d 71 (rev'd on other grounds); *Restatement (Second) of Torts* § 341A(1).

The existence of a legal duty in this regard is a question of law. *Dobrocke,* 2000 MT ¶ 28, 300 Mont at 354-355, 8 P.3d at 76. The legal duty to exercise ordinary care can require a property owner to warn or to take remedial actions to protect third parties from hidden or lurking dangers existing on the owner's property. *Limberhand v. Big Ditch Co.,* 218 Mont. 132, 144-146 (1985), 706 P.2d 491, 498-500. In addition, "'[A] duty may be owed though the condition is open and obvious if the landowner has reason to believe that despite the open and obvious nature of the condition, that injuries will nevertheless result.'" *Kaiser, supra,* 221 Mont. at 326, 718 P.2d at 1343 (quoting Justice Morrison in *Kronen v. Richter,* 211 Mont. 208, 211(1984), 683 P.2d 1315, 1318). Finally, a property owner's legal duty of care cannot be limited by his property line. Rather, a property owner has a duty to maintain his property so as to warn or protect persons from even hidden or obvious dangers existing on adjacent property. *Limberhand, supra, citing Piedalue v. Clinton Elementary Sch. Dist. No. 32,* 214 Mont. 99, 692 P.2 20 (1984). *See also Jacobs v. Laurel Volunteer Fire Dept.,* 2001 MT 98, 305 Mont. 225, 26 P.3d 730.

Local government clearly owes the public a legal duty to maintain county roads and bridges in a reasonably safe condition for the reasonably foreseeable public uses that will occur thereon. If SB 78 becomes law, after careful legal analysis, counties will likely be forced to close many if not most public bridges to avoid legal liability arising from the effects of the bill now before you.

B. Breach: Generally a question of fact.

What constitutes a "reasonably safe" condition "depends to a large extent on what use the property is put to, its setting, location and other physical characteristics; the type of person who would foreseeably visit, use or occupy the premises; and the specific type of hazard or unsafe condition alleged." *Richardson v. Corvallis Public Sch. Dist. No. 1,* 286 Mont. 309, 321 (1997), 950 P.2d 748, 755. In addition, whether a property owner should reasonably anticipate that harm could result hinges on the degree of ordinary care a reasonable person would exercise under the circumstances. *Richardson,* 286 Mont. at 321, 950 P.2d at 756. These determinative facts generally require a jury trial to resolve.

In *Kaiser,* the plaintiff sued the Town of Whitehall when she tripped over a rough sidewalk that had heaved and cracked because of an invading tree root. The Montana Supreme Court reversed summary judgment entered by District Court Judge Frank Davis for the City of Whitehall, despite the plaintiff's admission that she had actual knowledge of the obvious danger presented by the condition. 221 Mont. at 323, 718 P.2d at 1341-42. **"We find that although the condition of the sidewalk was known and obvious to Kaiser, a question of fact still remains as to whether or not the Town of Whitehall should have anticipated that someone (i.e.**

Kaiser) would be injured as a result of the defective condition of the sidewalk. The record shows the cracked and broken condition of the sidewalk had persisted for some time and that it was indeed a hazard to passing pedestrians. At the very least, a jury question is raised as to whether the Town of Whitehall should have anticipated the harm resulting from the sidewalk's condition. ..." *Id.*, 221 Mont. at 327, 718 P.2d at 1343-44. (emphasis supplied).

In *Limberhand,* a Billings apartment complex was built adjacent to a large irrigation canal. A young child visiting her aunt's apartment wandered off the apartment premises and into the canal, where she drowned. The apartment owners argued, unsuccessfully, that they did not own or control the canal and thus they could not have a legal duty to warn the girl or her mother of dangers, or to take remedial action aimed at protecting persons from property not under their ownership or control. The apartment owners also argued, to no avail, that the ditch company owned a right of way and that the company could sue the apartment complex if it erected a barrier that interfered with the ditch company's easement or maintenance of the canal. *Id.,* 218 Mont. at 146-147, 706 P.2d at 500. The Montana Supreme Court reversed summary judgment entered for the apartment complex owner, stating, "If the instrumentality causing harm is located adjacent to the landowner's property, and the instrumentality poses a clear and foreseeable danger to persons properly using the landowner's premises, we see no reason to shield the landowner from liability as a matter of law. A duty to take some reasonable precautions may exist." *Id.*, 218 Mont. at 146, 706 P.2d at 499. Is this Committee effectively requiring adjacent landowners to discharge this *Limberhand* duty by posting large billboards adjacent to county bridges to warn the public that they may suffer serious bodily injury or be killed because the bridges were neither designed nor built for fishing access and boat launching, etc.?

The *Limberhand* court cited *Piedalue, supra,* which "rejected a rigid property line determination of liability." *Limberhand,* 218 Mont. at 145-146, 706 P.2d at 499. In *Piedalue*, the court held that the owner of a trailer court owed a legal duty to guests to provide safe ingress to and egress from the property, and that a genuine issue of fact existed as to whether the owner breached that duty owed to the plaintiff. 214 Mont. at 103-104, 692 P.2d at 23. The facts in *Piedalue* are interesting.

The plaintiff was lawfully driving her vehicle at night within the trailer court. A road led outside of the trailer court and on to adjacent land that the trailer court owner previously sold to the Clinton School District. On the school district's land, the road crossed an irrigation ditch. A bridge used to exist over the ditch, but it had been removed. The plaintiff drove into the ditch, suffering serious injuries. Previously, while the trailer court owner still owned the land in question, the bridge had been destroyed by a large truck. In response to the destroyed bridge, and before he sold the land to the school district, the trailer court owner piled up gravel, erected a barrier of railroad ties and placed a warning sign on the road. *Id.*, 214 Mont. at 104-105, 692 P.2d at 23. That still wasn't good enough to absolve the trailer court owner of liability. Reversing the district court's entry of summary judgment for the trailer court owner, the Montana Supreme Court said, "a significant fact question exists, which must be determined by a fact-finder, as to whether [the defendant trailer court owner] provided a safe egress to an unsuspecting person lawfully upon [the trailer court owner's] premises." 214 Mont. at 105, 692 P.2d at 23. Perhaps billboards are not enough and landowners must actually barricade their property to prevent public access so as to protect the public from these public safety issues.

In *Jacobs, supra,* the plaintiff was injured in a chain reaction automobile accident that occurred during the annual Fourth of July fireworks display sponsored by a volunteer fire department. The event was on one end of town while the traffic was backed up on the other end, where the accident occurred. The court referred to *Piedalue*: "[W]e held that a property owner has a duty to maintain his or her premises in a reasonably safe condition or warn guests of the danger. *This includes safe ingress and egress beyond the premises.*" *Jacobs*, 305 Mont. at 229, 26 P.3d at 732-733. The court distinguished *Piedalue* because it dealt with a condition existing on land adjacent to the owner's property, not a condition on the other side of town. "Although a duty may have been owed by the fire department to assure safe passage at the event itself, the fire department has no duty to ensure that every spectator arrives safely to the event from their home." 305 Mont. at 229, 26 P.3d at 733. Clearly, adjacent landowners will be placed a risk of legal liability as a result of SB 78.

Dobrocke, *supra,* is instructive on at least three levels. In that case, the plaintiff was walking at night on the side of a city street when she fell and broke her elbow. 2000 MT 179 at ¶ 11; 300 Mont. at 350-351, 8 P.3d at 73. In part, the City successfully argued in the district court that while it owed plaintiff a legal duty to keep its streets and sidewalks in reasonably safe condition, that duty did not extend to the unimproved and unmaintained portions of the right-of-way. 2000 MT 179 at ¶ 29, 300 Mont. at 355, 8 P.3d at 76. The district court quoted 18 A Eugene McQuillan, *McQuillan Municipal Corp.* § 53.112 (1993 3rd ed), which states that "liability for injuries on park roads and ways 'may sometimes rest on the same ground as the liability for defective streets or sidewalks, but, a city is not required to keep every part of a public park safe for public travel, and is not liable for an injury sustained on a defective pathway not constructed for the use of the public.'" *Id.* The Montana Supreme Court reversed the district court as a matter of law, again affirming the general duty of care owed by all landowners as set forth in *Richardson, supra,* and extending such liability to "adjacent areas" as occurred in *Piedalue and Limberhand, i.e.*, unimproved portions of the right of way open to travel by the public. *Dobrocke,* 2000 MT 179 at ¶ 30-36, 300 Mont. at 355-356, 8 P.3d at 76-77. This Committee should have no doubt that our Court will extend this same duty of care to county bridges used as pedestrian routes and boat launches.

The City also successfully argued in the district court that it owed the pedestrian no duty of care under § 70-16-302, MCA, the statute granting limited immunity for free public recreational use of property. The district court entered summary judgment for the City, finding that the statute operated to bar the plaintiff's claims. As a matter of law, however, the Montana Supreme Court reversed the district court on this issue. The Court stated that while the act of walking could be construed under some circumstances as a recreational activity within the ambit of § 70-16-302, MCA, in that particular case the fact that the plaintiff was walking for no specified purpose along the edge of the city street could not be construed as a recreational purpose. 2000 MT 179 at ¶75, 300 Mont. at 365-66, 8 P.3d at 82.

The Court also relied on public policy analysis to render the immunity statute inapplicable to publicly owned land. Citing but seemingly disagreeing with *Fisher v. United States,* 534 F. Supp. 514, 515 (D. Mont. 1982), the Court stated that the only purpose of § 70-16-302, MCA, "'is to encourage landowners to make their lands freely available to the public by limiting the landowners' tort liability.' In the case before us on appeal, the lands in question are public lands

and are already freely available to the public. No encouragement to limit tort liability is or could be necessary to make land that is already freely available to the public more available." 2000 MT 179 at ¶ 77, 300 Mont. at 366, 8 P.3d at 83.

The plaintiff claimed that she tripped over a broken fence wire in the right-of-way. She argued that the City was negligent per se for violating a public safety statute, § 81-4-105, MCA, by failing to mitigate the fallen wire existing in its right-of-way. 2000 MT 179 at ¶¶ 60-66, 300 Mont. at 363, 8 P.3d at 80-81. The Supreme Court held that the statutory duty to mitigate wire in disrepair applied to the owner of the fence (who was also named as a defendant but dismissed upon stipulation of counsel). *Id.* The plaintiff also raised on appeal a new theory that the City was negligent per se for allowing a public nuisance to exist in its right of way, but the Supreme Court declined to entertain that theory for the first time on appeal. 2000 MT 179 at ¶ 67-68, 300 Mont. at 363, 8 P.3d at 81. The door is open for a plaintiff to sue both a county and an adjoining landowner on similar theories if this Committee adopts SB 78.

C. Violation of safety statutes, negligence per se, and strict liability.

In *Chambers v. City of Helena*, 2002 MT 142, 310, Mont. 241, 49 P.3d 587, the plaintiff was utilizing the City's "garbage transfer station," which basically amounted to an off-loading dock that terminated at an 8.5 foot deep concrete collection pit, which was not equipped with guard rails that would help prevent users from falling into it. The dock was equipped with short curbs that rose a few inches above the dock floor. The victim had backed his vehicle out on the off-loading dock and was attempting to discard a screen door from his vehicle. With his back to the collection pit, the plaintiff was pulling on the door when the piece he was holding broke away. He lurched backward, stumbled on the curbing and fell into the pit, suffering serious injuries. 2002 MT 142 ¶ 6, 310 Mont. at 244, 49 P.3d at 587.

At the close of evidence, the trial court ruled that the city had violated the uniform building code by failing to install guard rails around the 8.5 deep pit. It determined that the UBC had been incorporated in the City code by ordinance, and that violation of such an ordinance was tantamount to violation of a public safety statute. The matter was thus presented to the jury for determination of causation and damages. The jury determined that the City's negligence was not the cause of the victim's damages. *Id.* at ¶¶ 8, 9; 310 Mont. at 245, 49. P.3d at 589. The victim moved for a new trial, and the district court granted the motion. The City appealed the holding that it was negligent per se and the order granting the plaintiff a new trial. The Court affirmed the district court's determination that violation of the Uniform Building Code, which had been adopted by local municipal ordinance, was tantamount to violation of public safety statute and thus constituted negligence per se (violation of a particular statute or ordinance intended to regulate members of the defendants' class; plaintiff is a member of the class the statute or ordinance is intended to protect, with an injury of the sort the statute was enacted to prevent). ¶¶ 29-32, 310 Mont. 253, 49 P.3d at 592-593. Surely this Committee has analyzed the various safety statutes regulating public use of county roads and bridges, right?

In turn, the plaintiff cross-appealed an earlier court ruling holding that the City's transfer station does not constitute an abnormally dangerous condition as a matter of law under a theory of strict liability. The Supreme Court confirmed that the question of whether an activity is "abnormally dangerous" is a question of law for courts to determine, citing *Restatement (Second) of Torts*

§ 520, Comment l (1976). *Id.* at ¶ 19, 310 Mont. at 248-249, 49 P.3d at 591. Further, the Court held that in "determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of [Section 520] are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous conditions to any definition." ¶ 21, 310 Mont. at 249-250, 49 P.3d at 592, citing *Restatement (Second) of Torts* § 520, Comment f (1976). The Court reversed the trial court on this point, because of the trial court's incomplete determination of each of the § 520 factors.

The relevant § 520 factors that must be considered are: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by exercise of reasonable care; (d) extent to which the activity is not among common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes. Analyze the conduct depicted in the attached photographs of "sportsmen bridge access" in light of these factors.

D. Applying liability principles to bridge access under SB 78.

Regardless of the legal theory, i.e., negligence, negligence per se or strict liability, it takes little imagination and only a cursory review of the circumstances existing at many county roads and bridges to identify potential legal liability of state/county government, governmental employees and adjacent landowners for the death, bodily injury or property damage that could occur as a result of SB 78.

As a practical matter, few if any county bridges were designed and constructed to comply with modern traffic safety standards pertaining to the kind of vehicle parking and pedestrian access being advocated here. It is one thing to acknowledge in the abstract that a bridge and its abutments are part of the public way, but it is another thing entirely to advocate and promote public uses that obviously exceed the design, construction and purposes for which this infrastructure was built. The sponsor and those advocating SB 78 are recklessly exposing local government, local taxpayers and adjacent owners to risk of liability.

A number of existing public safety statutes are implicated by bridge access. For example, under § 61-8-353(1), MCA, "No person shall stop, stand or park any vehicle upon such highway unless such vehicle can be seen by the driver of any other vehicle approaching from either direction within 500 feet *and* unless drivers approaching from opposite directions are visible to each other when both are at least 500 feet from the vehicle to be stopped, turned or parked, except in cases of justifiable emergency." (Emphasis supplied.) In addition, § 61-8-354(1), MCA, provides in pertinent part that a "person may not stop, stand or park a vehicle (b) in front of a public or private driveway" and "(m) upon any bridge or any other elevated structure upon a highway... ." Again, it is not difficult to imagine a plaintiff invoking these statutes to remedy bodily injury, wrongful death and property damage resulting from the violation of these rules as a result of SB 78.

Another controversy involves the existence of fences at bridges, which in some instances are built by the controlling governmental authority and in others are built by adjacent landowners. Regardless of who builds the fences, they are quite common, if not ubiquitous, throughout Montana. SB 78 would mandate public passages be built through these fences. Ironically, under *Limberhand* and *Piedalue, supra,* the adjacent landowners who were sued as a result of dangerous conditions on others' property seemingly could have avoided legal liability by building fences barring public access to and from their lands. Here, SB 78 would prevent private landowners adjacent to public bridges from protecting themselves from such liability.

Dobrocke, supra, clearly illustrates how local government will be held liable for unsafe conditions existing in unimproved public right of ways. Contrast *Dobrocke* to *Howard v. Flathead Independent Telephone Co.,* 49 Mont. 197, 141 P. 153 (1914) (motorist collided with telephone pole in right of way and sued owner of authorized encroachment).

> While theoretically a public highway in this state is 60 feet in width...it is the rule recognized generally that the county is not required to grade or keep the highway for its entire width in condition for public travel; but its duty is fully discharged in this respect if the portion graded or made ready for travel is of sufficient width to accommodate the use which may fairly be anticipated made of it, and the authorities in control may use the remaining portions for purposes inconsistent with their use as driveways, as, for instance, for piling stones, cutting down and leaving steep embankments, or for drainage ditches.... (citations omitted). When a sufficient portion of the public highway is graded or otherwise prepared for travel, the invitation to the public to use the highway is confined to the prepared or used portion, and the duty then devolves upon the traveler to keep within that portion prepared for his use to which his invitation extends, and for injuries received outside of that portion he cannot recover, unless he can excuse his presence at the place where he was injured. *Howard,* 141 P. at 155.

Here, SB 78 *invites* the public to use aged, unimproved areas of the right of ways regardless of the conditions that may exist.

It is also worthwhile to consider *Dobrocke's* treatment of the recreational use immunity statute in the context of bridge access. The *Dobrocke* Court said it didn't apply to a person traveling within a right of way, even though the person was not within the improved portion intended for travel (it was icy). When is a person recreating *within* a public right of way as opposed to merely traveling upon it? Is an angler walking from his Cadillac Escalade down a bridge embankment with his Sage fly rod in reliance on SB 78 "recreating" yet, or is he merely traveling?

In a different context, the Montana Supreme Court has held that the driver and occupant of a vehicle lawfully traveling on a public road crossing State owned land were not "hunting", despite the fact that they were carrying hunting rifles, wearing blaze orange coats, and spotting big game to stalk and kill on adjacent private land. *See Weitz v. Montana Dep.'t of Natural Resources and Cons.,* 284 Mont. 130, 135-136, 943 P.2d 990, 993-994 (1997). Again, is a pedestrian recreating, or merely using a public road for its intended travel purpose, when scrambling up and down the rip-rapped slopes of a bridge, or cat-walking across the top of 20-foot high bridge abutment to get to water? More to the point, who is legally responsible for any injuries or death suffered as a result of this bridge access: the state for mandating that bridges be utilized for

purposes that the bridges were neither designed nor built to accommodate? The county that scoped the project, accepted the design and caused the bridge to be built? The contractor who built the bridge? Or the owner of the private land where the body was found?

SB 78 creates a slippery slope forcing local government to improve the condition of county bridges to accommodate parking, boat launching and pedestrian travel. To that extent, SB 78 constitutes an unfunded mandate to local government.

Finally, *Big Man v. State,* 192 Mont. 29, 626 P.2d 235 (1981), involved a 5-year-old boy who was struck and killed at a bridge on Interstate 90 in Bighorn County. The bridge was at a popular swimming hole and young children were known to frequent the area, utilizing the bridge abutment as a stream access point. The children also used a hole in the highway fence that angled inward from the interstate easement boundary to the concrete abutment located at the south end of the bridge. (Similar to other bridge fences existing throughout Montana and now objected to by the access movement.) The boy was struck and killed at the south end of the bridge, near his stream access point. 192 Mont. at 31, 626 P.2d at 236.

The plaintiff brought suit against the State for negligence in the construction and maintenance of the fence, and against the motorist. The defendants countered that the young boy darted so quickly from behind the bridge abutment that there simply was no time to avoid hitting him.

Citing § 61-8-504, MCA, the Court held that if children were present on the bridge or standing on the roadbed and readily visible, then the driver was under a legal duty to exercise precaution to avoid any collision and to sound her horn when such action became necessary. The Court reversed the trial court's entry of summary judgment on the fact questions related to whether the motorist breached her duty. Thus the motorist was faced with a jury trial to determine whether her actions caused this young child's death. SB 78 puts all of the traveling public behind that driver's wheel, by encouraging and promoting this kind of misuse of county bridges and roads.

The Court also determined, however, that the State had no legal duty to erect a fence to prevent the 5-year-old child from entering the controlled access freeway, despite the fact that the State had actual knowledge that children were frequently utilizing the bridge. With respect to the plaintiff's "attractive nuisance" theory, the Court stated "we are unable to find anything in the record that a five-year-old child would not be able to discover it nor be able to appreciate the dangers involved when walking thereon. In a society where cars, streets and highways are commonplace, a child from the minute he is able to walk is constantly reminded that one should be extremely careful of roadways. Consequently, by the time a child is five years of age, it may be he has grown to appreciate and fear the risks a highway presents to a pedestrian." 192 Mont. at 38, 626 P.2d at 240. I'm not convinced that the current Court would be so quick to effectively assign such adult responsibilities to a 5 year old.

The Court referenced, but did not analyze, the other elements of attractive nuisance under *Restatement of Torts (Second)* § 339, including that the condition involves an unreasonable risk of death or serious bodily harm; the utility of maintaining the condition is slight compared to the risk it presents to young children; and the owner fails to exercise ordinary care to eliminate the danger or to otherwise protect the children. The bottom line is that the young swimmer may still be alive today if somebody – the State or the adjacent landowner -- had maintained the fence or

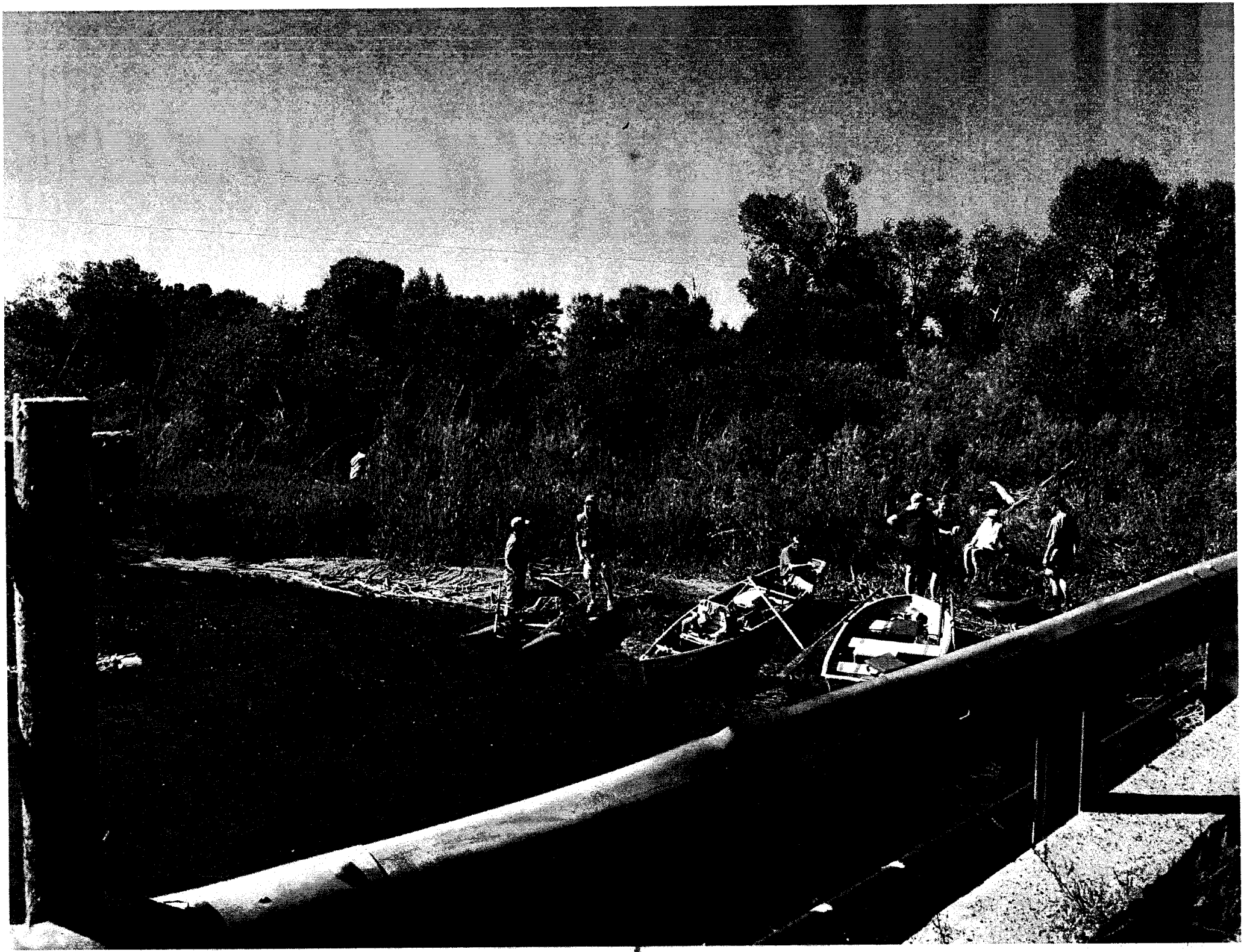
otherwise performed the common sense function of keeping pedestrians, particularly young children, out of the line of traffic where pedestrians are obviously exposed to the risk of serious bodily injury or death. This Committee should be vigilant and assure that no such harm arises as a result of SB 78.

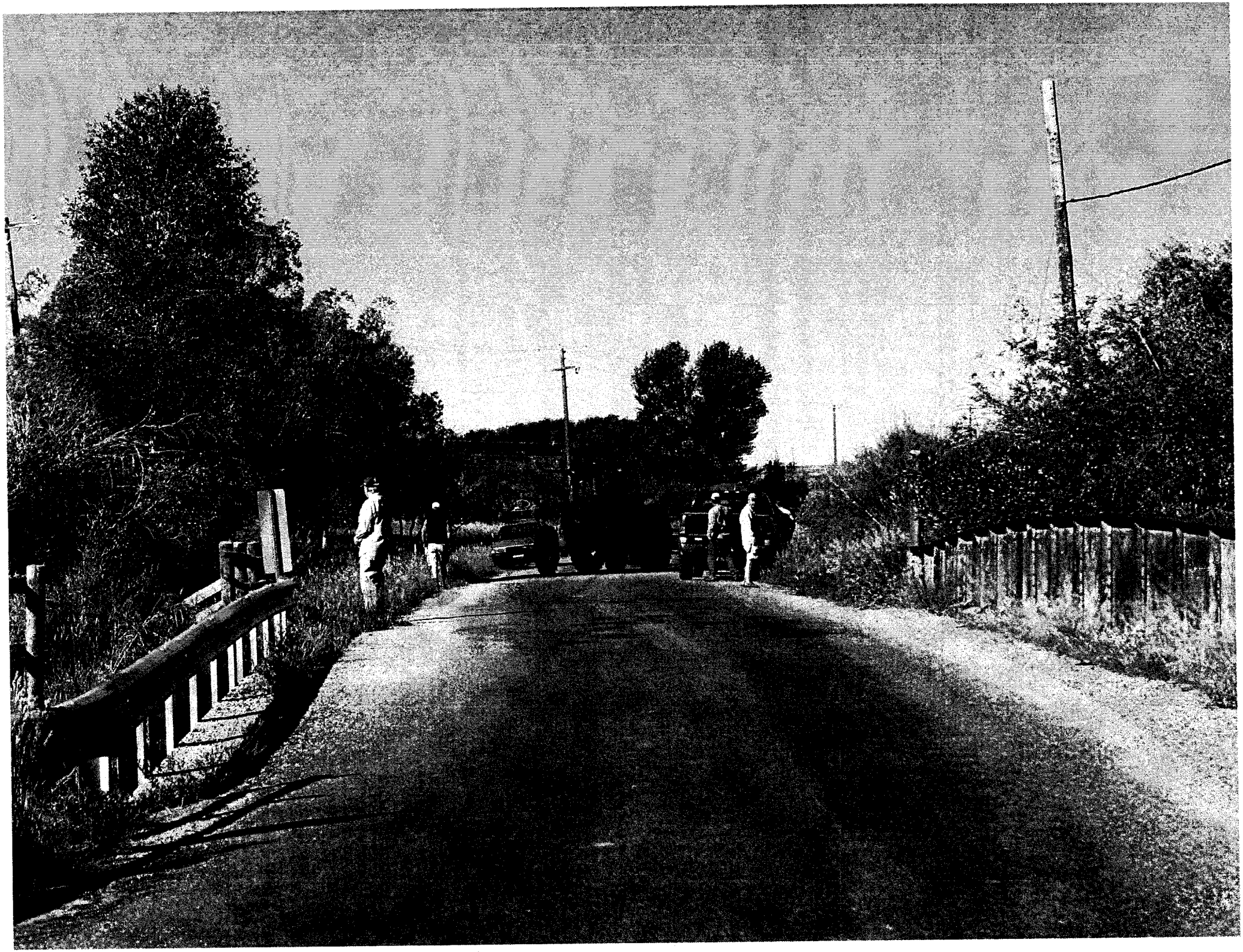
E. Conclusion

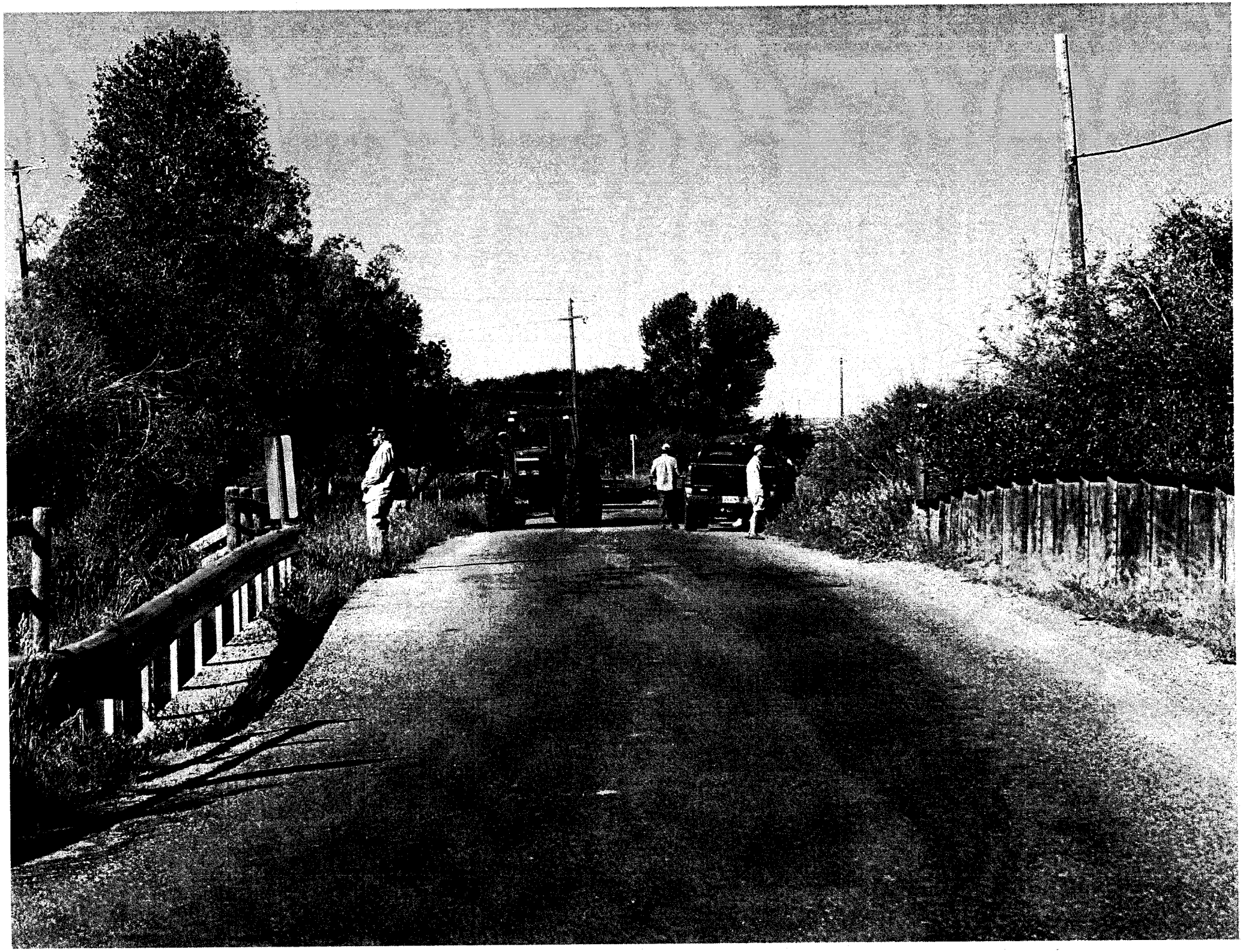
In my opinion, SB 78 invites the public to utilize county roads and bridges in illegal and unsafe manners exceeding the intended purpose and customary use of such infrastructure. I urge this Committee to table this bill lest the tragedy befalling those in *Big Man* becomes commonplace in the Last Best Place.

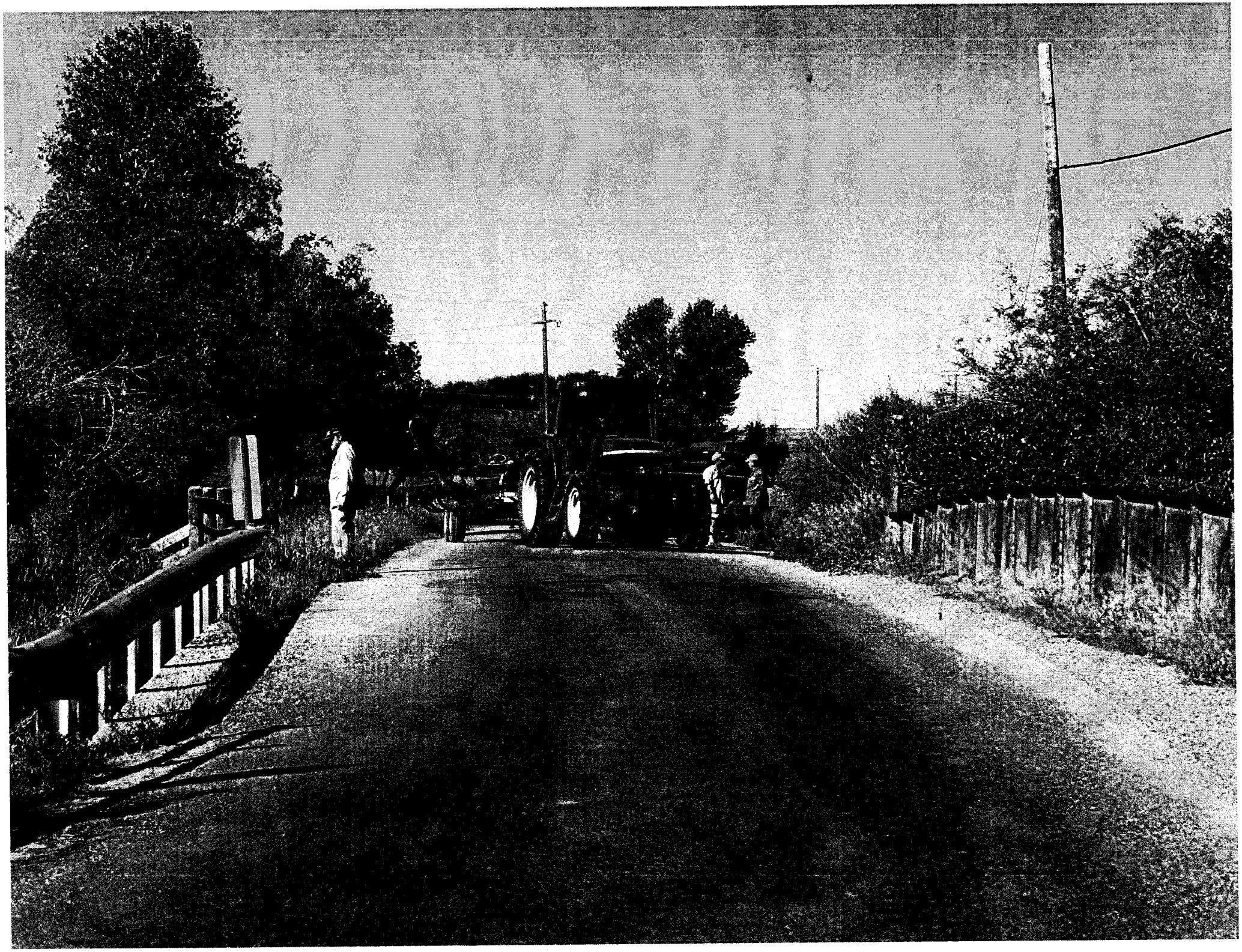
Yours truly,

Lance Lovell
Attorney at Law









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